

W. 11, 1985

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-219312.3, B-221231 **DATE:** April 4, 1986

MATTER OF: The Quality Inn Midtown

DIGEST:

1. Cancellation of solicitation after bid opening is proper where agency reasonably determined that the solicitation did not reflect the agency's actual anticipated needs.
2. Where there is no reasonable expectation of obtaining bids from two or more competitive small businesses, a contracting officer may resolicit on an unrestricted basis.

The Quality Inn Midtown (Quality Inn) protests the cancellation of invitation for bids (IFB) No. F05600-84-B-0036, a 100-percent small business set-aside issued by the Department of the Air Force (Air Force) (B-219312.2), and the resolicitation of the requirement under IFB No. F05600-86-B-0014 on an unrestricted basis (B-221231). Quality Inn contends that the cancellation after bid opening was not justified and is in violation of competitive procurement requirements. The protester asks that the canceled IFB be reinstated and that it receive the award based on its low bid.

For the reasons discussed below, we deny the protest.

IFB -0036 solicited bids to provide meals, lodging and transportation services for applicants being processed through the Military Entrance Processing Station (MEPS) in Denver, Colorado. The fixed-price contract to be awarded covered a 7-month base period from March 1, 1985, through September 30, 1985, with two 1-year options.

Of the eight firms which responded to the IFB by bid opening on February 11, 1985, one submitted a "no bid." The low bid submitted by Denver 8 Motel was rejected because the bidder was determined to be nonresponsible and the Small Business Administration (SBA) declined to issue a certificate of competency (COC) under its COC procedures. The second low bid was rejected because the SBA determined that it was not a

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small business concern. Quality Inn's third low bid was initially rejected as nonresponsive and the firm protested this action to our Office (B-219312.1). That protest was sustained at the agency level and we closed our files on the matter.

Thereafter, the contracting officer requested a preaward survey to determine Quality Inn's responsibility. The survey questioned the firm's ability to perform as required because the bidder's facilities were not operational. According to the Air Force, a mid-July 1985 inspection revealed that all the necessary rooms were not available since the hotel was undergoing extensive renovations and the restaurant and kitchen were not opened. The record shows that at the first follow-up visit in August 1985, the dining room and kitchen facilities still were not open for business; renovations of the hotel rooms were not completed; and the proposed security for the premises had not been installed. A second follow-up visit on September 1 revealed no change in the progress of work.

The agency states that the contracting officer never made a responsibility determination because the preaward survey was never completed as a result of the hotel not being presented as ready for operation. Nor did the contracting officer refer the question of Quality Inn's responsibility to the SBA for consideration under its COC program, as the agency now acknowledges it should have done.^{1/}

On November 15, 1985, the contracting officer decided to cancel the IFB on the grounds that the requirements were being significantly increased. After receiving notification of the cancellation and the resolicitation from the Air Force, Quality Inn timely protested to our Office.

Initially, the protester argues that it has been prejudiced by the contracting officer's failure to determine its responsibility because, if a negative determination had

^{1/} The record indicates that at bid opening, the first low bidder's facilities were also being renovated. The contracting officer found the firm nonresponsive because the facility was not ready for use and a referral was made to the SBA.

been made, the agency would then be required by law to refer the matter to the SBA under the COC procedures. Thus, Quality Inn asserts that it was denied the opportunity to apply for a COC.

Further, the protester states that the increased requirements for MEPS do not justify cancellation of the IFB. Quality Inn maintains that the requirements under the original IFB have been the same for years and represent an ongoing need by the government. In any event, Quality Inn contends, the new requirements represent additional needs that should be satisfied by a new procurement as required by Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.404-1(a)(3) (1984). Thus, Quality Inn asserts that it should have been awarded the contract on the basis of the estimates contained in the original schedule.

The Air Force responds that award was not made to Quality Inn because the preaward survey team never could conclude that the firm was able to begin contract performance as scheduled. As previously stated, the base contract period was to start on March 1, 1985, yet the agency states that as of September 1, 1985, the protester's facility still was not available to provide the contract services. Therefore, the agency argues that since award of the base contract period could not be made to the only bidder it considered eligible for award, it had a legitimate reason to cancel the IFB.

The Air Force further states that it canceled the solicitation due to the notice received by the contracting officer on November 1, 1985, that MEPS's needs for the 2 option years had increased. The protester does not dispute that the MEPS's requirements for these services have in fact been increased. Finally, the agency contends that during the processing of its protest response it discovered that an outdated Department of Labor Wage Determination was included in the solicitation. The Air Force argues that this occurrence further supports a finding that there was a reasonable basis to cancel and readvertise the revised requirements.

Because of the potential adverse impact on the competitive bidding system, FAR § 14.404-1(a)(1) provides that, after bids have been opened, award must be made to the

lowest responsible bidder unless there is a compelling reason to reject all bids and resolicit. We have recognized that a change in the agency's requirements after the opening of bids so that the solicitation no longer reflects the agency's minimum needs constitutes such a compelling reason. John C. Kohler Co., B-218133, Apr. 22, 1985, 85-1 C.P.D. ¶ 460 at 3. We will not question a contracting officer's determination that a compelling reason exists if it reflects a reasoned judgment based upon the investigation and evaluation of the information available at the time the decision is made. Id.

In this instance, we cannot conclude that the Air Force acted unreasonably. At the time the solicitation was issued, the Air Force had estimated what its needs for processing new recruits over a 3-year period would be. However, where as here, at the time the decision to cancel is made, the agency learns that its needs exceed those stated in the IFB, we have found that a compelling reason to cancel an IFB exists. See Dyneteria, Inc., B-211525.2, Oct. 31, 1984, 84-2 C.P.D. ¶ 484. The regulation which Quality Inn cites, FAR, 48 C.F.R. § 14.404-1(a)(3), which bars an agency from canceling an IFB after bid opening due to increased requirements, applies where an agency is procuring a supply of items, and not where, as here, the agency is procuring services needed to perform specified work. See Garrison Constr. Co., B-211359.2, Oct. 31, 1983, 83-2 C.P.D. ¶ 515.

On the basis of the record before us, we find that the Air Force was justified in canceling the IFB after bid opening on the basis of the increased requirements. Since we reach this conclusion, we need not address the other reasons given by the Air Force for canceling the solicitation.

We agree with Quality Inn's argument that the Air Force should have referred the question of its responsibility to the SBA. As the Air Force recognizes, when the protester failed to demonstrate at its first inspection that it was prepared to commence performance, it would have been within the contracting officer's discretion to have determined it to be nonresponsible and referred the matter to the SBA for final disposition under the COC procedures, since only the SBA has conclusive authority to determine whether a small business bidder is nonresponsible. See FAR, 48 C.F.R.

§ 19.602 (1984); Sess Constr. Co., 64 Comp. Gen. 355 (1985), 85-1 C.P.D. ¶ 319.2/ In view of our finding that the cancellation was otherwise proper, however, we do not recommend remedial action.

Finally, we consider the protester's objections to the agency's decision to resolicit on an unrestricted basis. The contracting officer reports that on the basis of the competition for the original IFB, he determined that there was no reasonable expectation of receiving bids from at least two responsible small business concerns at a reasonable price. In addition, the contracting officer states that he consulted with the regional officer for the SBA who shared his opinion that there was "inadequate small business competition" for this requirement.

Quality Inn alleges that the contracting officer's decision to reprocur on an unrestricted basis is improper because in its view, there is a reasonable expectation that "at least three (3) small businesses" could compete for the new solicitation.

The governing procurement regulations pertaining to small businesses recognize that a small business set-aside may be withdrawn by the contracting officer when it is determined that there is no reasonable expectation of receiving bids from at least two responsible small businesses and that award cannot be made at a reasonable price. See FAR, 48 C.F.R. § 19.502-2 (1984); cf. Swan Industries, B-217210, Mar. 25, 1985, 85-1 C.P.D. ¶ 346. Moreover, the determination as to whether adequate competition reasonably may be expected is essentially a business judgment within the discretion of the contracting

2/ The contracting officer's failure to do so appears not to have been done to deprive the protester of the award but, on the contrary, to permit the protester--which appeared to be the only bidder who would be eligible for award--an opportunity to make good on its promises that its facility soon would be operational. When, in the Air Force's opinion, this did not materialize--it states the restaurant and kitchen were not opened until early December 1985--the entire base contract period had been consumed by challenges to various bidders' responsibility or small business size status, the rejection of the protester's bid as nonresponsive (which was reversed) and the opportunity given it to have its facility operational.

officer which we will not disturb, absent a clear showing of abuse of discretion. Advance Machine Co., B-217399, Sept. 20 1985, 85-2 C.P.D. ¶ 311 at 2. Here, the protester has not made the necessary showing that the contracting officer abused his discretion.

On the contrary, the record indicates that the agency had ample reasons to open the competitive process. Of the seven firms that submitted a bid under the original solicitation one was found nonresponsive by the SBA; three were not small businesses as determined by the SBA; two were informally deemed large business concerns by the regional SBA representative; and, the question of the protester's responsibility was never determined. Thus, we cannot say that the contracting officer abused his discretion in deciding to resolicit bids on an unrestricted basis.

Accordingly, the protest is denied.

for Seymour Efron
Harry R. Van Oleve
General Counsel